

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

)	
)	No. C-04-4537 SC
RADIAN INTERNATIONAL, LLC,)	
)	
Plaintiff,)	ORDER RE: DEFENDANT'S
)	MOTION TO DISMISS
v.)	COMPLAINT FOR
)	IMPROPER VENUE, LACK
ALPINA INSURANCE COMPANY,)	OF PERSONAL
)	JURISDICTION, AND
Defendant.)	<u>FORUM NON CONVENIENS</u>
_____)	

Plaintiff Radian International, LLC ("Plaintiff") brought this action against Defendant Alpina Insurance Company ("Defendant") to obtain declaratory relief and damages for an alleged breach of contract. The suit stems from a disagreement over whether or not Defendant had a duty to defend and indemnify Plaintiff pursuant to an insurance policy. The parties disagree over whether the policy at issue covers defense costs and damages resulting from a dispute between Plaintiff and Solidere, a quasi-governmental Lebanese entity which engaged Plaintiff to carry out environmental remediation work on a landfill in Beirut, Lebanon.

Defendant now specially appears before the Court to move for dismissal based on improper venue, lack of personal jurisdiction, or forum non conveniens. Because the Court finds that dismissal for improper venue is appropriate, the Court does not consider the

1 alternative arguments. Nor does the Court consider the underlying
2 merits of the case. Rather, this Order is concerned solely with
3 the dispositive question of whether or not venue is proper.

4 Defendant asserts that venue is improper due to a forum
5 selection clause contained in the underlying insurance contract.
6 Motion at 2. The clause reads as follows:

7 In the event an Insured and the Company dispute the
8 meaning, interpretation or operation of any term,
9 condition, definition or provision of this Policy
10 resulting in litigation, an Insured and the Company
11 agree that the laws of the State of Lebanon shall be
12 governing [sic] this Policy in all disputes,
13 interpretation or operation of any terms, condition,
14 definition or provision. Hence any resolution to a
15 dispute, interpretation or operation of any terms,
16 condition, definition or provision shall be held in
17 Beirut, Lebanon.

18 Amended Complaint, Exhibit A-1 at 10. Essentially, Defendant's
19 improper venue argument boils down to whether or not this clause
20 is enforceable. For the following reasons, the Court holds that
21 it is enforceable.

22 The main argument put forth by Plaintiff in seeking to defeat
23 this Motion is that the clause is not a mandatory forum selection
24 clause. As Plaintiff correctly points out, the Ninth Circuit only
25 enforces "mandatory" forum selection clauses which "confer
26 exclusive and mandatory jurisdiction." Hunt Wesson Foods, Inc. v.
27 Supreme Oil Co., 817 F.2d 75, 78 (9th Cir. 1987). It does not
28 enforce "permissive" clauses which merely grant jurisdiction to a
particular forum without ruling out concurrent jurisdiction in
other forums. Id. at 77-78.

Therefore, when faced with the question of whether or not to
enforce a forum selection clause, a District Court must look to

1 examples of both mandatory and permissive forum selection clauses
2 to determine into which category the one at issue falls. See,
3 e.g., Koresko v. RealNetworks, Inc., 291 F. Supp. 2d 1157 (E.D.
4 Cal. 2003). An example of an enforceable, mandatory clause is:

5 This agreement shall be deemed to be a contract made
6 under the laws of the State of Virginia ... Licensee
7 hereby agrees and consents to jurisdiction of the
8 courts of the State of Virginia. Venue of any action
brought hereunder shall be deemed to be in Gloucester
County, Virginia.

9 Docksider, Ltd. v. Sea Tech. Ltd., 875 F.2d 762 (9th Cir. 1989).

10 In holding the clause enforceable, the Docksider court focused on
11 the final sentence's inherent meaning of exclusivity. Id. at 763.
12 On the other hand, an example of a permissive, unenforceable
13 clause is:

14 The courts of California, County of Orange, shall have
15 jurisdiction over the parties in any action at law
relating to the subject matter or the interpretation of
this contract.

16 Hunt Wesson Foods, 817 F.2d at 76. In holding this clause to be
17 unenforceable, the Hunt Wesson court stated, "Although the word
18 'shall' is a mandatory term, here it mandates nothing more than
19 that the Orange County courts have jurisdiction." Id. at 77.
20 The court continued, "Such consent to jurisdiction, however, does
21 not mean that the same subject matter cannot be litigated in any
22 other court." Id. The issue before this Court is thus whether
23 the forum selection clause at hand is permissive like the Hunt
24 Wesson clause or mandatory like the Docksider clause.

25 The Court finds that the clause here is unambiguously a
26 mandatory clause. In particular, the Court points to the final
27 sentence, which states that "any resolution to a dispute ... shall
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1 be held in Beirut, Lebanon." Amended Complaint, Exhibit A-1 at
2 10. Unlike the phrase "shall have jurisdiction" in Hunt Wesson,
3 which does not suggest any exclusivity, the phrase "shall be held"
4 unambiguously mandates exclusivity. Compare N. Cal. Dist. Council
5 of Laborers v. Pittsburg-Des Moines Steel Co., 69 F.3d 1034 (9th
6 Cir. 1995) (holding that "shall be enforceable by a petition to
7 confirm an arbitration award filed in the Superior Court of the
8 City and County of San Francisco" is a permissive forum selection
9 clause), with Pelleport Investors, Inc. v. Budco Quality Theatres,
10 Inc., 741 F.2d 273 (9th Cir. 1984) (holding that "shall be
11 litigated only in the Superior Court for Los Angeles, California"
12 is an enforceable forum selection clause). Therefore, the clause
13 now before the Court is an enforceable, mandatory forum selection
14 clause.

15 A second argument put forth by Plaintiff is that Lebanon is
16 an unreasonable forum. Generally, "[a] forum selection clause is
17 prima facie valid and should be enforced unless enforcement is
18 shown by the resisting party to be 'unreasonable' under the
19 circumstances." Fireman's Fund Ins. Co. v. Cho Yang Shipping Co.,
20 131 F.3d 1336, 1338 (9th Cir. 1997) (internal citations and
21 quotations omitted). Plaintiff relies in part on an Eighth
22 Circuit case which held that a forum selection clause requiring
23 litigation in Iran was unreasonable. McDonnell Douglas Corp. v.
24 Islamic Republic of Iran, 758 F.2d 341 (8th Cir. 1985). However,
25 McDonnell Douglas is easily distinguishable from the instant case.
26 In that case, the court noted that Iran was at the time fighting a
27 war with Iraq, which had an announced aim of shooting down
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1 commercial airliners over Iran. Id. at 346. The court also noted
2 that Iran and the United States had no diplomatic relations. Id.
3 The situation in present-day Lebanon is not at all similar, and
4 courts in other jurisdictions have enforced forum selection
5 clauses mandating litigation in Lebanon. See Iskandar v. American
6 Univ., 98 Civ. 6616, 1999 U.S. Dist. LEXIS 12195, at *10-12
7 (S.D.N.Y. Aug. 9, 1999).

8 Plaintiff also contends that the clause at issue is
9 unreasonable because the United States Department of State has
10 cautioned against travel to Lebanon and because recent events
11 there suggest a lack of stability. Opposition at 8-10. However,
12 this argument does not comport with the Plaintiff's ready
13 agreement to the clause when the contract was signed. Plaintiff
14 alleges that the Lebanese security situation has deteriorated
15 markedly since 1999, when the insurance policy came into effect.
16 However, even taking as true all the allegations put forth by
17 Plaintiff, the Court does not agree that the current situation is
18 so different that the Court should decline to enforce a clause
19 which Plaintiff readily agreed to in 1999. For example, Plaintiff
20 points to the recent bombing assassination of a Lebanese political
21 leader. Opposition at 9. However, terrorist bombings are not at
22 all specific to Lebanon as recent events in Madrid and London have
23 sadly demonstrated. Or, Plaintiff points to a State Department
24 travel warning for Lebanon, but a travel warning by itself does
25 not make litigation in a particular country per se unreasonable.
26 See Ismail v. Am. Univ. of Beirut, 246 F. Supp. 2d 330 (S.D.N.Y.
27 2003) (granting dismissal based on forum non conveniens
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1 notwithstanding a travel warning for Lebanon). Therefore, this
2 Court does not agree that the domestic situation in Lebanon makes
3 the clause at issue unreasonable.¹

4 Plaintiff has put forth a third argument to prevent
5 enforcement of the forum selection clause. Plaintiff states,
6 "Radian's principal claim seeks damages based on Alpina's bad
7 faith handling of Radian's tender of the Solidere action, an
8 extra-contractual theory of liability clearly outside the
9 contemplation of [the forum selection clause.]" Opposition at 7.
10 Along the same lines, Plaintiff asserts that its bad faith claim
11 is outside the scope of the clause because it does not involve a
12 dispute over the "meaning, interpretation or operation of any
13 term, condition, definition or provision of this Policy." Id. at
14 8. Plaintiff cites no case law to support either of these
15 propositions. In fact, controlling case law conclusively
16 demonstrates that Plaintiff's bad faith cause of action does fall
17 within the scope of the forum selection clause. Regardless of
18 whether the bad faith claim is contractual or tortious in nature,
19 or "extra-contractual" as Plaintiff alleges, it falls within the
20 scope of the clause as long as resolution of the claim "relates to

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22 ¹ Plaintiff also suggests that witnesses in the United States
23 will be unlikely to travel to Lebanon for dispute resolution
24 proceedings. However, just as American courts have procedures for
25 taking out-of-jurisdiction depositions of witnesses, this Court
26 assumes that Lebanese courts have similar procedures unless
27 Plaintiff can show otherwise. In terms of travel by legal
28 professionals to Lebanon, it is unclear to the Court why a large
number of legal professionals would even need to visit Lebanon
given that the clause at issue mandates that Lebanese law controls,
and presumably, local counsel is most knowledgeable about Lebanese
law.

1 interpretation of the contract." Manetti-Farrow, Inc. v. Gucci
2 America, Inc., 858 F.2d 509, 514 (9th Cir. 1988). Based on this
3 Court's reading of the Amended Complaint, the bad faith claim
4 clearly relates to interpretation of the contract--the claim
5 alleges that Defendant "has failed to deal fairly and in good
6 faith with Radian by unreasonably refusing to pay Radian's defense
7 costs and damages awarded in the Solidere Action and has
8 maliciously refused to defend or indemnify Radian ..." Amended
9 Complaint at 10. This Court finds that it would be impossible to
10 extricate the issue of whether or not Defendant Alpina reasonably
11 refused to defend and indemnify Plaintiff from the issue of what
12 the insurance contract required. Therefore, this Court holds that
13 the bad faith claim falls within the purview of the forum
14 selection clause.

15 "[A] valid forum selection clause is given controlling weight
16 in all but the most exceptional cases." Manetti-Farrow, Inc., 858
17 F.2d at 513, citing to Stewart Org., Inc. v. Ricoh Corp., 487 U.S.
18 22, 33 (1988) (Kennedy, J., concurring). In the case at hand,
19 Plaintiff has not presented a compelling argument that would
20 support finding this to be one of those most exceptional cases.
21 Therefore, the Court GRANTS Defendant's Motion to Dismiss.

22 IT IS SO ORDERED.

23 Dated: July 14, 2005

24 /s/ Samuel Conti
25 UNITED STATES DISTRICT JUDGE
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